Muiruri & 2 others v Blaetermann (Suing through Shabir Hatim Ali) & another (Civil Appeal E023 of 2022) [2024] KECA 1160 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1160 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E023 OF 2022

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

SEPTEMBER 20, 2024

BETWEEN

DAVID MWANGI MUIRURI ..... 1ST APPELLANT

GHOTMAN COTOVA ..... 2ND APPELLANT

EMPIRES AND PARTNERS INVESTMENTS ..... 3RD APPELLANT

AND

MIRKO BLAETERMANN (SUING THROUGH SHABIR HATIM ALI) ..... 1ST RESPONDENT

HELMUT KOSER (SUING THROUGH PUBLIC TRUSTEE) . 2ND RESPONDENT

(Being an appeal from the Judgement of the Environment and Land Court at Malindi (J. O. Olola, J.) delivered on 17th March 2022 in ELC Cause No. 27 of 2012)

JUDGMENT

1. By a plaint dated 29th February 2012 and amended on 12th November 2012, Mirko Blaettermann suing through his attorney Shabir Hatim Ali (the 1st Respondent) and the Public Trustee suing on behalf of Helmut Koster (the 2nd Respondent) sought judgement against the three appellants jointly and severally for:

    1. a declaration that the proceedings in the purported case being Malindi CMCC No. 18A of 2004 and all the orders thereto is null and void with no legal consequences, and that the Land Registrar Mombasa do expunge entry numbers 6, 7, 8, 10 and 11 from the register in volume LT. 21 Folio 368/4 file 3853 Land Portion No. 622 (Original No. M.17G) and restore Karl – Heinz Borner, Mirko Blaettermann and Helmut Koster as the registered proprietors of the suit premises;

2. a permanent injunction restraining the appellants by themselves, agents, servants, legal representative assigns or anyone claiming interest through them from entering, remaining in, alienating, trespassing and/or dealing with the suit premises in any manner whatsoever;

3. general damages;

4. costs of the suit;

5. interest at Court rates; and

6. any other relief that this Honourable Court may deem fit to grant in the circumstances.

2. The respondents' contention was that they were the registered owners of plot No. 622 (Original No. M. 17G) Malindi (the suit property), which they jointly owned together with Karl-Heinz Borner (the original owners); that Shabir Hatim Ali, the donee of a power of attorney from the 1st respondent, was their caretaker with power to manage, maintain, lease and take good care of the suit property in the best interest of the original owners of the suit property since the year 1995; that, on or about the year 2004, the 1st appellant, with the intention to defraud the original owners of the suit property, caused to be prepared forged court proceedings together with a judgment purporting to have been given in Malindi CMCC No. 18A of 2004 allegedly filed by the 2nd appellant against the original owners of the suit property; that the 1st appellant proceeded to obtain by unknown means a duly sealed and stamped judgment, decree and order arising from the said case; and that the effect of the purported proceedings and judgment were to defraud and divest the suit property from the respondents and have it registered and/or unlawfully transferred to the 2nd and 3rd appellants in collusion with the 1st appellant.

3. PW1, Shabir Hatim Ali Dhaha testified on behalf of the 1st respondent that he got to know the 1st respondent through his father, Hatim Ali Dhaha, at the Vasco da Gama Lodge in Malindi; that his father also introduced him to Karl Henzo Borner and Helmut Koster; that the three were operating the Vasco da Gama Lodge situate on the suit property; that, thereafter, the three appointed him as the Manager and Administrator of the Lodge and left the Country in 1997 upon instructing PW1 to scout for a buyer for the property; that, sometime in the year 2008,, he was served with a court order in Malindi CMCC No. 18A of 2004 which suit was filed by the 2nd appellant against the original owners of the suit property; that the 2nd appellant was declared the new owner and was required to take over possession of the same; that it was alleged that the suit arose from a breach of contract between the 2nd appellant and the registered owners; that, according to the said order, the original owners were to be deregistered as proprietors of the suit property, that they were to be evicted therefrom; and that the 2nd appellant was to be registered as the new owner of the property.

4. It was PW1's evidence that, upon receipt of the decree, he complied and vacated the suit property whereupon the 1st appellant moved in and took over the premises; that, when he followed up the matter, he discovered that the documents were forgeries; and that, when he went to inquire at the Magistrates Court, the court was unable to confirm the existence of Malindi CMCC No. 18A of 2004, as the court file could not be traced.

5. According to PW1, he reported the matter to the Anti- Corruption office, but was referred to the Criminal Investigations Department (CID) offices in Malindi who, after conducting investigations, concluded that the documents had been forged; that, in the course of the investigations, the CID brought to his attention an order issued in Miscellaneous Civil Suit No. 5 of 2007 on 27th February 2007 directing the Registrar of Lands to dispense with the production of original title in transferring the property to the 2nd appellant; that he tried in vain to trace the Malindi Miscellaneous case No. 5 of 2007, but that the file was unavailable; that the magistrate who was said to have issued the orders

swore an affidavit on 4th April 2011 denying that he signed the said order; that, on conducting a search at the Land Registry, he learnt from an indenture dated 20th April 1995 that the three original owners were the registered owners of the land; that the position only changed following the registration of the order made in Malindi CMCC No. 18A of 2004 by which the 2nd appellant became the owner thereof after which the suit property was acquired by the 3rd appellant for a sum of Kshs.1,770,000/=; that, subsequently, the suit property was transferred to Max International Limited and to another company known as White-House International; and that, when he checked with the Registrar of Companies, PW1 discovered that the 1st appellant was a director of the said companies.

6. It was disclosed by PW1 that, after the investigations, the 1st appellant was charged in criminal case No. 345 of 2011 with forgery of judicial documents, but was acquitted; that the Director of Public Prosecutions appealed against the acquittal; and that after his eviction from the suit property, the property was developed with construction of 10 furnished Villas, a bigger house, casuarina trees, a swimming pool, a well and a fully furnished lounge.

7. On cross-examination, PW1 conceded that he is the one who initiated the suit under and by virtue of a power of attorney given to him by the 1st respondent; that Mr. Korster was deceased, but the other two proprietors were alive in Germany; that he had no power of attorney from the other two owners; and that, since 1997, the owners had not visited the county; that the 1st appellant was acquitted under section 210 of the Criminal Procedure Code; that the advertisement that appeared in the newspaper on 15th November 2011 claiming that the original owners of the suit property were no longer the owners of the property was paid for by the appellants and not the 1st respondent; and that the 1st respondent was aware of the case.

8. In their joint Statement of Defence dated 9th March 2012 and filed on 12th March 2012, the appellants denied the contents of the plaint and urged the court to dismiss the suit. They averred that, while the 1st appellant is a licensed Court Process Server of the High Court authorized to effect Court process throughout the Republic of Kenya, the 2nd appellant is a business enterprise registered under the Business Names Act (Cap. 499) in the names of Ghotman Cotova & General Merchants; that the 3rd appellant is equally a business name registered under the same statute; that the 3rd appellant was an innocent purchaser for value and the current registered owner of the said suit property; and that the suit was brought without capacity was fatally defective and a non-starter.

9. While conceding that the 1st respondent was at one time a registered owner of the suit property jointly with others, the appellants asserted that the 1st respondent did transfer his interest together with that of his partners to the 2nd appellant vide a consent recorded in Malindi CMCC No. 18A of 2004; that, following refusal by the Registrar of Titles to effect the transfer of the suit property to the 2nd appellant in the absence of a court order, they were compelled to institute Malindi Miscellaneous Civil Suit No. 5 of 2007 in which they obtained orders of transfer; and that the original court files for the two cases mysteriously disappeared from the Court Registry.

10. The appellants further denied that PW1 was ever a caretaker of the suit property save on a few occasions when he trespassed thereon to harass tenants in the premises; that the respondents, through an advertisement placed in the Daily Nation Newspaper of 15th February 2011, categorically intimated that they were no longer owners of the property.

11. In support of their case, the appellants relied on the evidence of the 1st appellant who testified as DW1. It was his evidence that he is a businessman and hotelier by profession, and that he is "also the 2nd and 3rd appellants"; that, sometimes in the year 2001, he met the original owners of the suit property, Karl Heinz Borner, Mirko Blaetterman and Helmut Koster at a hotel in Malindi where he worked;

that the three original owners were the proprietors of Vasco da Gama Lodge that was operated on the suit property; that, in 2003, the original owners informed him that they intended to construct more bungalows at the Lodge, but that they did not have funds for the intended development; that they told him that they needed to be supplied with building materials on credit; that he was then running a business under the 2nd appellant through which he entered into an agreement to supply the materials to the original owners of the suit property; and that the contract required that he be paid immediately after the completion of the buildings and cottages which period was estimated not to be over eight (8) months.

12. It was contended that, following the breach of the said agreement by the original owners of the suit property, the 1st appellant instructed Messrs Awiti Omolo & Company Advocates who instituted Malindi CMCC No. 18(A) of 2004; that his Advocate informed him that, despite being served with court documents in the said case, the original owners of the suit property failed or refused to enter appearance; that, on 11th March 2004, one of them, Karl Heinz Borner, called him and requested for an urgent meeting and that, during the meeting, the 1st appellant was offered the property to offset the debt owed as well as the on-going court case; that, although the 1st appellant accepted the offer, he decided to proceed with the case to conclusion upon consultation with his advocate; and that, later on, the Advocate advised him that a judgement had been rendered in his favour, and that they needed to file an application to have the suit property transferred to him.

13. It was the 1st appellant's evidence that he was unable to raise the money required to file the application for some time, and that, in the meantime, his then advocate fell ill and died in the year 2005; that, on 2nd February 2007, he went to court and applied for certified copies of Court documents in Malindi CMCC No. 18(A) of 2004 and thereafter filed the application for transfer of the property through his new advocates; that, in March 2007, his new advocate called him and notified him that his application had been granted in Miscellaneous Civil Suit No. 5 of 2007, and that the suit property had been transferred in his favour; that he then got a business partner one Bramuchi Mercimullano with whom they formed Max International & Company Limited to which he transferred the suit property before selling it to one Bruno Pezzola, who was introduced to him by PW1; that, when the said Bruno failed to pay the agreed purchase price, he instituted Malindi HCCC No. 72 of 2007 against him; that it was only then that the allegations of forgery were made against him; that, during the hearing, the Court files in Malindi CMCC No. 18(A) of 2004 and Miscellaneous Civil Suit No. 5 of 2007 were produced before the trial Judge; and that the court confirmed the validity of the judgment in Malindi CMCC No. 18(A) of 2004.

14. In his judgement, the learned trial Judge found that, while the suit property was said to have changed hands a number of times, the same essentially remained in the hands of the 1st appellant. The learned Judge cited Order 9 Rule 1 and 2 of the Civil Procedure Rules; the cases of Jack J. Khanjira & Another v Safaricom Limited (2012) eKLR; and Edmund Mwangi Waweru v Gabriel Wanjohi Waweru & Another (2017) eKLR, and found that, although the power of attorney was not produced by PW1, it was produced by the appellants in their bundle of documents, a perusal of which revealed that the power granted to PW1 was not limited but encompassed the power to recover and maintain possession of the suit property, and to protect the same from wastage, damage or trespass; that the mandate given to him to recover the land could only be done by way of a suit; that he was indeed in possession of the suit property before the appellants took over the same; that, given the circumstance in which he was dispossessed of the property, failure to seek prior approval of the court before seeking to recover the land would not render the suit fatally defective; and that, in any case, there was no prejudice caused to the appellants on account of that failure.

15. According to the learned Judge, while the appellants insisted that a consent was recorded in Malindi CMCC No. 18A of 2004 wherein the respondents relinquished their interests in the suit property, the judgment attributed to the case made no reference to such a consent; that, in those circumstances, the sentiments of Meoli, J. in her ruling dated 7th November 2012 that the proceedings arising from the said case were "crude, irregular and most unusual", could not be faulted; that, while the magistrate who heard Malindi CMCC No. 18A of 2004 did not get a chance to testify in the suit due to all manner of procrastination and dithering on the part of both parties, it was clear that, at some point, the 1st appellant was charged with forgery of judicial proceedings in Malindi CMCR No. 345 of 2011; that a perusal of the proceedings in the criminal case produced by the appellants in their bundle of documents revealed that both the Chief Magistrate and the then Malindi Senior Resident Magistrate who was said to have issued orders in Miscellaneous Civil Applicati*on No. 5 of 2007* disowned the existence of the said proceedings and/or that they presided over the same; that, even if one was to assume that the proceedings in the said Malindi CMCC No. 18A of 2004 were regular and valid, it was difficult to see how the net effect of the same would result in the transfer of the suit property to the 2nd appellant's name since, according to the 1st appellant, the 2nd appellant had filed the suit claiming a debt of Kshs.1.7 Million from the original owners of the suit property in respect of supply of construction materials to the suit property; that a breach of contract would only entitle a party to damages for the loss suffered which damages are designed to compensate for the damage, loss or injury the claimant has suffered through that breach; and that, since the appellants themselves described the suit property as a multimillion shilling beach property, it was unclear how a debt of Kshs.1.7 million could lead to the transfer of the suit property as an alternative to damages.

16. The learned Judge noted that, in the course of the trial, the appellants were asked to avail a copy of the original consent recorded in court and/or the decree emanating therefrom, but none was produced; that, even though the 1st appellant was acquitted of the criminal case of forgery, it did not follow that the said Malindi CMCC No. 18 A of 2004 and Miscellaneous Civil Applicati*on No. 5 of 2007* ever existed in the court's record or at all; that having failed to demonstrate the existence of the two cases, there was no basis upon which the 1st appellant took possession of the suit property from the respondents; that the 2nd appellant never acquired the suit property, and that it was therefore not possessed of the capacity to transfer the same to the 3rd appellant; that, while in its pleadings the 3rd appellant was said to have acquired the suit property for value without notice, in his testimony, the 1st appellant asserted that he was not only the 1st but also the 2nd and 3rd defendants meaning that the suit property never exchanged hands as purported, and that the same remained at all times in the hands of the 1st appellant, it having irregularly been dispossessed from the respondents; that the supposed transfers to dummy businesses under the control of the 1st appellant were nothing but a fraudulent attempt by him to put the suit property out of reach of the true owners thereof; that the actions of the 1st appellant amounted to trespass to property as he had no basis for his entry thereon, and hence the respondents were entitled to general damages for trespass; and that, since the exact value of the land before and after the trespass was not given, and the respondents were reinstated onto the suit land some four years after the trespass by an order of the court, a sum of Kshs.4,000,000 sufficed as compensation for general damages.

17. In the premises, the learned Judge entered judgment for the respondents in the following terms:

> " 1. A declaration that the proceedings in the purported case being Malindi CMCC No. 18A of 2004 and all the consequential orders thereto is null and void with no legal consequences and that the Land Registrar Mombasa do expunge entry numbers 6, 7, 8, 10 and 11 from the register in Volume L.T 21 Folio 368/4 file 3853 Land Portion No. 622 (original No. M.17G) and restore

back Karl – Heinz Borner, Mirko Blaettermann and Helmut Koster as the registered proprietors of the suit premises;

2. A permanent order of injunction restraining the defendants by themselves, their agents, servants, legal representatives, assigns or anyone claiming interest through them from entering, remaining in, alienating, trespassing and/or dealing with the suit property in any manner whatsoever;

3. General damages of Kshs.4,000,000;

4. Costs of the suit to the Plaintiff; and

5. Interest on 3 at Court rates."

18. Dissatisfied with the said decision, the appellants lodged the instant appeal in which they urged us to allow based on unnecessarily argumentative 8 grounds of appeal contrary to the prescription of rule 88 of the Court of Appeal Rules, 2022, which enjoins appellants to "... concisely set forth under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against". Such practice was frowned upon by the Supreme Court of Uganda in Kamurasi v Accord Properties Ltd [2000] 1 EA 90 (SCU) in which the Court reiterated that a memorandum of appeal should neither be argumentative nor narrative, and the Court noted that such practice reveals the failure by parties to acquaint themselves with the rules applicable to appeals before the Court. See also *Moses Kipkolum Kogo v David Malakwen Civil Appeal No. 74 of 1998*.

19. In summary, the appellants based their appeal on the grounds that the learned Judge erred in law and in fact: by losing sight of and totally misdirecting himself as to the appellants' unchallenged exhibits presented before the court; by losing sight and purpose of the two earlier rulings delivered in the case; in admitting the power of attorney allegedly donated by the 1st respondent to PW1 as an exhibit in favour of the respondents' case, and yet the same was not produced by the respondents; in declaring that there was no evidence adduced to prove that there existed two lower court suits in light of the unchallenged evidence to the contrary; and in misdirecting himself as to the evidence and issues raised before him for determination, thereby arriving at wrong findings.

20. We heard the appeal on 17th April 2024 on this Court's GoTo virtual platform when learned counsel, Mr. George Kariuki, appeared for the appellants while learned counsel, Mr. Mwadilo, appeared for the 1st respondent. There was no appearance for the 2nd respondent notwithstanding due service of the hearing notice on its counsel. Both learned counsel relied on their written submissions, which they briefly highlighted.

21. However, we note that there were two sets of submissions on record purportedly filed on behalf of the 1st respondent. The 1st set dated 22nd November 2023 was filed by the firm of Khaminwa & Khaminwa Advocates while the 2nd set dated 13th April 2023 was purportedly drawn by the 1st respondent in person. There was also a Notice to Act in Person dated 11th October 2022 purportedly drawn and filed by the 1st respondent and that, prior to that notice, there was a Notice of Appointment of Advocates dated 11th August 2020 drawn by Oruenjo Kibet & Khalid Advocates in which the firm indicated that that it had been appointed to act for the 1st respondent alongside the firm of Khaminwa & Khaminwa Advocates. In the Notice to Act in Person, it was indicated that the 1st respondent would be acting without involvement of any advocate or agents, including the firm of Khaminwa & Khaminwa Advocates and Oruenjo Kibet and Khalid Advocates the reason being the "history of illegal representation by unknown agents and advocates, including observed illegal filing of suits in the 1st respondent's name without authority". The address indicated in both documents as the 1st

respondent's was the local German Embassy while the payment receipt for the submissions dated 13th April 2023 indicated that the submissions were paid for by the firm of Oruenjo Kibet & Khalid Advocates. There was an email message dated 3rd April 2024 purportedly from the 1st respondent to the Deputy Registrar of this Court acknowledging the receipt of the hearing notice and confirming that he was relying on his written submissions. In those submissions, the 1st respondent urged this Court to allow the appellants' appeal and dismiss the suit in the lower court with costs to be borne by PW1.

22. Mr Mwadilo informed us that he was unaware of the circumstances under which the Notice to Act in Person and the submissions dated 13th April 2023 were filed. According to learned counsel, the 1st respondent had not withdrawn instructions from the firm of Khaminwa & Khaminwa Advocates and that, as far as he was concerned, the said firm was properly on record. In our judgement, we cannot unravel the mystery surrounding the purported appearance in person by the 1st respondent or the circumstances under which the 1st respondent, whose address in the submissions is purportedly care of Embassy of the Federal Republic of Germany, instructed the firm of Oruenjo Kibet & Khalid Advocates to pay for the said submissions. In the premises, we have no basis for relying on the submissions dated 13th April 2023, whose origin is unclear. As Mr Mwadilo confirmed that the firm of Khaminwa & Khaminwa was still retained in the matter, we shall consider the submissions filed by that firm as those of the 1st respondent.

23. The appellants relied on the submissions dated 1st April 2023 drawn by George Kariuki & Associates and, without citing any authority, urged us to allow the appeal and set aside the judgement delivered on 17th March 2022 with costs to be paid by PW1. Similarly, the 1st respondent, in the submissions dated 22nd November 2023 drawn by the firm of Khaminwa & Khaminwa Advocates, reiterated the evidence on record and, without citing any authority, urged us to dismiss the appeal with costs.

24. This being a first appeal, this Court's mandate as espoused in the case of Peters v Sunday Post Ltd [1958] E.A 424 is that:

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."

25. This position was restated in Selle v Associated Motor Boat Co. [1968] EA 123 where this Court held that:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif - vs- Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."

26. In discharge of its obligation, this Court, as the first appellate court, will interfere with the findings of the trial court, as held in Alfarus Muli v Lucy M Lavuta & Another [1997] eKLR:

> " only if it is shown that there was absolutely no evidence or that the evidence that was there could not possibly support such a finding...Even if a Judge does not give his reasons for his finding the appellate Court can find the same in the evidence."

27. In dealing with cases where this Court is asked to interfere with the factual findings of the trial court, as a first appellate court, this Court laid down the law in this regard in the case of Francis Lokadongoy Lokogy v Reuben Kiplagat Kiptarus [2020] eKLR thus:

> "...court is under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching its own conclusions in the matter. In carrying out this duty this court has to remember that it has no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. The court has also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanour of witnesses. In a nutshell a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement."

28. In this appeal, the appellants submitted that the learned Judge ignored the evidence and exhibits adduced by the appellants. It was pointed out that the evidence adduced by the appellants was not challenged since their witness was not even cross-examined; and that, although the appellants produced two bundles of documents in evidence, no reference was made to them. The 1st respondent did not directly deal with this submission. It is true that when the appellants' case was heard, learned counsel for the 1st respondent, Mr Mbura, for some undisclosed reason, informed the court that he was not prepared to cross-examine the 1st appellant, the only witness for the appellants. That notwithstanding, the mere fact that the evidence presented by a party is not challenged does not necessarily mean that the suit must succeed since, as explained by this Court in *Mbuthia Macharia v Annah Mutua Ndwiga & another, Civil Appeal No. 297 of 2015* [2017] eKLR, pursuant to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability, and it is for that party to show that the facts which he alleges his case depends on exist. The Court in that case expressed itself as follows:

> " This is known as the legal burden and we need not repeat, save to emphasize the same principle of law is amplified by the learned authors of the leading Text Book;- The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:
>
> > 'The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
> >
> > 14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden

lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."

(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.'"

29. This Court restated the law in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR where it held that:

> "It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side."

30. The 1st appellant claimed that the documents in his two bundles were never referred to by the trial court. The appellants' case was that there was a contract between the 2nd appellant and the respondents in which the 2nd appellant supplied construction materials to the respondent; that, as a result of the breach of the agreement by failure to settle the amount owed in the sum of Kshs 1,700,000, the 2nd appellant instituted in Malindi CMCC No 18A of 2004 in which a consent was recorded and the resultant judgement entered transferring the suit property to the 2nd appellant. It is therefore clear that the 2nd appellant's claim over the suit property did not arise from the claim filed by him in the said in Malindi CMCC No 18A of 2004, but from the consent giving rise to the judgement therein. The trial court considered the evidence presented in respect of this contention and held that:

> " Even where one was to assume that the proceedings in the said Malindi CMCC No. 18A of 2004 were regular and valid, it was difficult to see how the net effect of the same would result in the transfer of the suit property to the 2nd Defendant's name. According to the 1st Defendant, the 2nd Defendant had filed the suit claiming a debt of Kshs.1.7 Million from the original owners of the suit property. He has produced in evidence bundles of invoices purporting to demonstrate that the 2nd defendant supplied construction materials to the suit land.
>
> A breach of contract would in my view only entitle a party to damages for the loss suffered. Such damages are designed to compensate for the damages, loss or injury the claimant has suffered through that breach. Such damages, especially in a case such as this one would entail monetary compensation. The defendants themselves describe the suit property as a multimillion shilling beach property and I was unable to understand how a debt of Kshs.1.7 million could lead to the transfer of the property as an alternative to damages."

31. In our view, the success of the appellants' case depended on their ability to prove the existence of the decisions in Malindi CMCC No 18A of 2004 and Malindi Misc Civ Suit 5 of 2007. The learned Judge found that, in the absence of the said decisions and the consent allegedly recorded in Malindi CMCC No 18A of 2004, the appellants' claim to the suit property could not stand. In the words of the learned Judge:

> "In the course of the trial which commenced before the Honourable Justice Angote, the defendants were asked to avail a copy of the original consent recorded in Court and/or the decree emanating therefrom. None was produced and even though the 1st Defendant was acquitted of the criminal case of forgery, I am not persuaded that the said Malindi CMCC No. 18 A of 2004 and Miscellaneous Civil Applicati*on No. 5 of 2007* ever existed in the Court's record or at all.
>
> Having failed to demonstrate the existence of the two cases, it follows that there was no basis upon which the 1st Defendant took possession of the suit premises from the Plaintiffs. The 2nd Defendant never acquired the suit property and it was therefore not possessed of the capacity to transfer the same to the 3rd Defendant."

32. Having found that there was no evidence that the proceedings relied upon by the appellants to claim the suit property ever existed, the learned Judge cannot be faulted for not considering the evidence on record. The evidence on record clearly did not support the transfer of the suit property. Had the appellants claimed the suit property on the basis of the execution of the decree in respect of the claimed sum, that would have been different. In this case the transfer of the suit property was based on the judgement itself rather than on the consequential execution process. In those circumstances, the only relevant material for consideration was the fact of the entry of the judgement. It is not every piece of evidence placed before the court that ought to be considered, but only that evidence whose consideration is material and relevant to the issues raised for determination in the suit. In our view, nothing turns on this submission.

33. The learned Judge was also faulted for ignoring the two earlier rulings. The first was dated 29th April 2013 in which the court opined that, where an act is required to be done by the parties, it is only those parties that can do so and not through their proxies or persons holding powers of attorney. The other ruling referred to was the one dated 10th October 2014 in which the court was, prima facie, not convinced of the validity of the power of attorney. It was submitted that, by making a finding contrary to the ones made in the earlier rulings, the learned Judge sat on appeal on those rulings. We find no response to this submission in the 1st respondent's submissions.

34. We have perused the record and find that the ruling dated 29th April 2013 was the subject of an application dated 7th December 2012, which sought to have the amended plaint struck out for non-compliance with the order dated 6th November 2012. That order granted conditional injunction. The second reason for seeking the relief was non-compliance with Order 8 rule 7(2) of the Civil Procedure Rules, which provides that:

> All amendments shall be shown by striking out in red ink all deleted words, but in such a manner as to leave them legible, and by underlining in red ink all added words.

35. In his ruling, the learned Judge (Angote, J), dismissed the application and held that:

> "At this stage, my task is to establish if the order of Justice Meoli has been complied with by the plaintiff to enable the plaintiff to enjoy the conditional injunctive orders which were

granted by the court on 6th November 2012. I am not required to ascertain whether the power of attorney which Shabir Hatim Ali relied on to institute the current suit is a forgery or not. That will be for the trial court to do."

36. It is clear that in that ruling, the learned Judge did not pronounce himself on the validity of the power of attorney. The other decision referred to was dated 10th October 2014, which was a ruling from an application dated 9th July 2014 in which the 1st respondent sought summary judgement against the appellants. In the said ruling, the learned Judge referred to an earlier order by Meoli, J. in which it was stated that:

> "In accordance with the provisions of Order 9 rule 1 and 2 of the Civil Procedure Rules, any further applications, appearance or act required by the law shall be made or done by the following persons namely: Mirko Blaetterman, Heinz Borner, Helmut Koster, Sylvia Hilderg Erna and David Muiruri and the prosecution of this matter shall be by the party in person, if the party is alive and not through persons holding powers of attorney albeit executed by such living parties."

37. The learned Judge (Angote, J.) then formed the opinion that:

> "It would seem that the court was not convinced, prima facie, that Shabir Hatim Ali had a valid power of attorney thus the above order. Whether the said Shabir Hatim Ali has a valid power of attorney from Mirko Blattermann or any other person to bring this suit is an issue that can only be determined at the main hearing of the suit."

38. Clearly, Angote, J. did not determine the validity of the power of attorney. Similarly, Angote, J. found, rightly in our view, that the findings by Meoli, J. were merely prima facie views. Neither the sentiments of Angote, J. nor Meoli, J. can be said to have bound the learned Judge (Olola, J.), who eventually heard and determined the suit. Prima facie findings by courts when determining applications for injunctions or summary judgement do not ordinarily bind the trial court. That was the position of this Court in *Uhuru Highway Development Limited v Central Bank of Kenya Limited & 2 Others Civil Appeal No. 36 of 1996* in which the decision in Kanshi Ram v Bansi Lal AIR 1977 Himachal Pradesh 61, was cited in holding that:

> "Opinions expressed on the merits of a case at the stage of interlocutory proceedings for the issuance of a temporary injunction are not binding on the trial court...A trial Court as opposed to a Judge sitting in chambers hearing an interlocutory application, applies and must apply its own mind to facts on evidence before it without regard to what may have been expressed by the Judge or an appellate court in regard to the merits of a case in determining whether or not there is a prima facie case."

39. In view of the foregoing, we find the submission by the appellants that the trial Judge sat on appeal on matters already determined by other judges to be misconceived.

40. It was noted that, although indicated as having been attested in Germany, the power of attorney was not notarised; that,though drawn in Malindi, the document was indicated to have been attested both in Germany and in Nairobi the same day; that the name of the 1st respondent is indicated in the document as Mirko Blatterman as opposed to his real name, Mirko Blaettermann.

41. Regarding the place where the power of attorney was issued, since it was the appellants who were alleging that it required to be notarised, it was upon them, pursuant to section 109 of the *Evidence Act*, to adduce evidence to the effect that it was not attested in Kenya. Whereas the 1st respondent's

address therein is indicated as Germany and his signature is attested by a person whose address does not appear to be Kenyan, that is not sufficient evidence that the 1st respondent's signature on the power of attorney was in fact attested in Germany or outside the country. That evidence would only go to show that the address of the person attesting the power of attorney is Germany rather than that the document was attested in Germany. Similarly, the fact that a document is drawn in Malindi does not necessarily follow that the signature therein must be attested in Malindi. We find no substance in the submissions regarding the discrepancy in the 1st respondent's name and, on the whole, nothing turns on this submission.

42. It was further submitted by the appellants that the learned Judge, on his own motion, authenticated the power of attorney held by PW1 and purportedly donated by the 1st respondent without an application by any of the parties even after observing the irregularities in the said power of attorney. The appellants submitted that PW1 ought to have sought and obtained prior approval of the court pursuant to Order 9 Rule 1 and 2 of the Civil Procedure Rules. The said provision reads:

> 1. Any application to or appearance or act in any Court required or authorized by the law to be made or done by a party in such Court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:
>
> Provided that-
>
> a. Any such appearance shall, if the court so directs, be made by the party in person.
>
> (b) .....
>
> 2. The recognized agents of parties by whom such appearances applications and acts may be made or done are—
>
> a. Subject to approval by the Court in any particular suit persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of the parties.

43. The provisions require that persons filing suits as holders of powers of attorney be approved by the court. In his decision, the learned Judge cited Jack J. Khanjira & Another v Safaricom Limited (2012) eKLR; and Edmund Mwangi Waweru v Gabriel Wanjohi Waweru & Another (2017) eKLR and found that:

> " In my view, the mandate given to him [Shabir Hatim Ali] to recover the land could only be done by way of a suit. Shabir was indeed in possession of the suit premises before the Defendants took over the same and given the circumstance in which he was dispossessed of the property, I did not think that the failure to seek prior approval of the Court before seeking to recover the land would render the suit fatally defective. At any rate, I would not find any prejudice caused to the Defendants on account of that failure."

44. Mwongo, J, in Jack J. Khanjira & Another v Safaricom Limited (2012) eKLR observed as follows:

> "Clearly, the essential characteristic of a person acting as a recognized agent is that he or she acts, appears or makes any such applications, acts or appearances subject to the approval of the Court. The above provision is important because by the very nature of the instrument of their appointment, it may donate to them powers which are, in law, untenable. So that, it

> appears to me that when exercising their functions in Court, they must periodically obtain the approval of the Court to do such acts. It is for the Court to oversee the scope and extent of the functions of a recognized agent, and to assure itself that they are not overstepping the bounds of the law. In my view, it is not the fact of being an agent that renders a donee of a power as recognised; it is the extent or scope of their agency that is recognised. That is to say, a recognised agent can perform only that which he is recognised or authorized to do in law."

45. On the other hand, Waithaka, J. in Edmund Mwangi Waweru v Gabriel Wanjohi Waweru & Another (2017) eKLR was of the view that:

> "... failure to seek approval of the Court to do the acts specified in that section of the law does not necessarily render the act or appearance fatally defective. I begin by pointing out that the power of attorney granted to the Plaintiff authorized him to sell, make legal claims, maintain and exercise all of her rights as owner of the property in all capacities...Despite the fact that the approval of this Court was not sought before the Plaintiff instituted this suit, there being no prejudice caused on the defendant on account of that failure, I find and hold that the failure did not affect the respondent's capacity to sue on account of the general power of attorney given on him by his sister."

46. We agree with the learned Judge and the decisions relied upon that the mere fact that a prior approval by the court of the power of attorney was not sought and obtained was not fatal to the suit, more so as no prejudice was alleged to have been occasioned to the appellants by the said omission. The approval of the court, in our view, is meant to safeguard against busybodies purporting to hold powers of attorney, or holding fake powers of attorney from purporting to act as agent of parties without their knowledge. It is also meant to ensure that the authority conferred by the power of attorney includes commencement and prosecution of legal proceedings. It has nothing to do with the merit of the suit.

47. According to the appellants, in the absence of a valid power of attorney, PW1's testimony was that of a mere witness as opposed to a party and, without the evidence of the 1st respondent, the evidence of PW1 could not be relied upon to support the 1st respondent's case, as the 1st respondent remained a "ghost plaintiff".

48. If we understand the appellants correctly, a party's case cannot be proved unless that party testifies. With due respect to the appellants, that is not the legal position. What is required is that oral evidence must be direct and be presented by a competent witness. As regards direct evidence, section 63(1) and (2) of the *Evidence Act* provides that:

    1. Oral evidence must in all cases be direct evidence.

    2. For the purposes of subsection (1) of this section, "direct evidence" means—

        a. with reference to a fact which could be seen, the evidence of a witness who says he saw it;

        b. with reference to a fact which could be heard, the evidence of a witness who says he heard it;

        c. with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;

d. with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:

49. Regarding competency of witnesses, section 125(1) provides that:

> All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.

50. In this appeal, it has neither been contended that the evidence presented by PW1 was not direct nor was it alleged that PW1 was not a competent witness. In our view, the evidence of any person well versed with the facts of the case based on his own knowledge and being competent as to testify to them may be relied upon by the court to prove the issues in dispute notwithstanding that they may not be parties to the proceedings.

51. It was further submitted that the learned Judge ignored the communication by the 1st respondent in a letter dated 14th December 2018 and the notice to act in person dated 4th April 2018 to the effect that he never donated the power of attorney to any person, a position reiterated by him in his replying affidavit sworn on 30th August 2018; that the learned Judge erred in admitting the impugned power of attorney allegedly donated by the 1st respondent to PW1 as an exhibit in favour of the respondents, yet the advocate who purportedly attested the power of attorney denied having attested it, and that it was not produced by the respondents; that the learned Judge failed to consider the position adopted by the 1st respondent that he never filed the suit, and the fact that there was no evidence that the 2nd respondent was dead; that the learned Judge failed to appreciate the admission by PW1 that he had handed over the suit property to the appellants and committed himself to pay damages; and that the learned Judge misdirected himself in his evaluation of the documents produced and the evidence adduced before him.

52. In his reply, Mr Mwadilo submitted that the advocate who attested the execution of the power of attorney was not called as a witness and, therefore, a finding could not be made on the contention that he never attested thereto.

53. As stated at the beginning of this judgement, only two witnesses testified, Shabir Hatim Ali for the respondents and the 1st appellant on behalf of the appellants. In our view, the mere fact that a party produces a bundle of documents, some of which are inadmissible while others contain inadmissible hearsay, does not bind the court in determining their probative value. A document does not become admissible simply because it is contained in a bundle filed in court. Accordingly, letters written by third parties, unless formally produced as exhibits, do not constitute evidence as to their contents as opposed to allegation of their having been written. That is our understanding of the decision in Kenneth Nyaga Mwige v Austin Kiguta & 2 Others (2015) eKLR where it was held that:

> "How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not became part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the

document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record."

54. Whereas affidavit evidence is evidence on oath, unless an affidavit is admitted as part of the evidence at the trial, its weight may only be on the same plane as that of evidence in chief not subjected to cross-examination. The weight to be attached to evidence that is not subjected to cross-examination was evaluated in Maganlal v King Emperor AIR 1946 Nagpur 126 where it was held that:

> " The examination of a witness by the adverse party shall be called his cross-examination. The purpose of the cross-examination is to test the veracity of the witness. No evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination."

55. It is therefore our view that the sentiments purportedly made by the 1st respondent in the said letter and affidavit regarding the competency of the suit were worthless as they were not part of the evidence in the main suit, having not been subjected to cross-examination. The same position applies to the letter dated 25th April 2012 allegedly written by Samuel Buku Kinuthia casting aspersions on the authenticity of what appeared to be his stamp and signature on the power of attorney. The said advocate ought to have been called to testify on the allegations that he made since he admitted that the stamp and signature resembled his. Regarding the issue as to whether the trial court could properly rely on the power of attorney which was placed in evidence by the appellants and not the respondents, we hold that, once a document is properly placed on the record by a party, it forms part of the record of the proceedings and subject to the rules relating to admissibility and relevance, and the trial court is entitled to consider it without interrogating which party produced it. A document, once admitted in evidence, no longer belongs to a party, but forms part of the court record.

56. It was further submitted that the learned Judge misdirected himself when he found that there was no evidence of the existence of the two lower court suits, CMCC No 18A of 2004 and Malindi Misc. Civil Suit 5 of 2007 in the face of unchallenged evidence that the two suits indeed existed; that, during the hearing of the Criminal Case No 345 of 2011, the court registers were produced evidently showing the existence of Malindi Misc. Civil Suit 5 of 2007; and that the learned Judge failed to consider the evidence that the files for the two suits were stolen.

57. In response, it was submitted on behalf of the 1st respondent that, although it was contended that a consent was recorded in Malindi CMCC No 18A of 2004 by which the 1st respondent transferred his interest together with that of his partners to the 2nd appellant, the judgement did not make any reference to the said consent; that since the 2nd appellant did not acquire the suit property, it had no capacity to transfer the same to the 3rd appellant; that the proceedings in the said case were crude, irregular and most unusual as the said suits never existed; that, since the original owners left the country in 1997, there was no way the 1st respondent could have given his consent to the said transfer in 2004; that since the appellants' purported claim against the 1st respondent was for Kshs 1,700,000, it was difficult to see how the judgement in respect thereof could have resulted in the transfer of the suit property to the 2nd appellant when a breach of contract only entitles a party to damages; and that, in this case, the appellants described the property as a multimillion beach property and, therefore, it could not have been transferred to settle a debt of Kshs 1,700,000.

58. In this case, it was the appellants who were propounding the existence of the two suits, and consequently, it was incumbent upon them to satisfy the court that the suits did exist. This must be so because of the evidential burden of proof codified in section 109 of the *Evidence Act* which provides that:

> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

59. While dealing with the legal and evidential burden of proof, this Court expressed itself in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, as follows:

> " As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

60. In the criminal proceedings, the judicial officer who was alleged to have delivered the decision in CMCC No 18A of 2004 denied knowledge of such decision while the magistrate who was alleged to have issued the order in Malindi Misc. Civil Suit 5 of 2007 swore an affidavit denying having signed that order. The learned magistrate who purportedly delivered the judgement in the earlier suit was, due to procrastination on the part of the parties, not called to testify in order to shed more light on the matter. Although the 1st appellant testified that the Court files in Malindi CMCC No. 18(A) of 2004 and Miscellaneous Civil Suit No. 5 of 2007 were produced during the hearing in Malindi HCCC No. 72 of 2007, he did not deem it fit to have the proceedings in HCCC No. 72 of 2007 produced to confirm this position. In this case, it was the appellants who were asserting the existence of the two matters while the respondents were simply denying their existence. In other words, while the appellants' assertion was a positive one, the respondents' was simply a negation of that assertion. Section 109 aforesaid placed the burden on the appellants to prove that assertion. As for the respondents, they could derive solace from the holding of the Supreme Court of Uganda (Seaton, JSC) in the case of J K Patel v Spear Motors Ltd SCCA No. 4 of 1991 that:

> " The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises. In general, the rule which applies is ei qui affirmat not ei qui negat incumbit probatio. It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons...As applied to judicial proceedings the phrase "burden of proof" has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence....The onus probandi rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgement if no further evidence were adduced." See Constantine Steamship Line Ltd vs. Imperial Smelting Corp [1914] 2 All ER 165 (H.L); Trevor Price vs. Kelsall [1975] EA 752 at 761; Phippson on Evidence 12th Ed Para 91; Phippson At Para 95."

61. The appellants having failed to prove the existence of the two suits, the burden of proof did not shift to the respondents.

62. In light of these facts and in light of the well-founded doubts harboured by the learned Judge regarding the propriety of awarding the suit parcel in a claim that was purportedly for damages for breach of contract for an amount far less than the value of the suit property, the learned Judge cannot be faulted for arriving at the conclusion that there was no sufficient evidence that the two suits existed. In his own evidence, the 1st appellant stated that, notwithstanding the offer by the original owners of the suit property to transfer the suit property to him in consideration of the settlement of the debt owed, his advocates insisted that the suit proceeds. If that was the true position, then the ensuing judgement could only have been for the amount claimed and not for the suit property. How such a judgement could have mutated to a decree for transfer of the suit property remains a mystery.

63. The appellants argued that the learned Judge erred in not considering the fact that, in Criminal Case No. 345 of 2011, the 1st appellant was acquitted under section 210 of the Criminal Procedure Code and that, although the appeal against that acquittal was successful, he was acquitted in the subsequent retrial after being placed on his defence. Responding to this submission, the 1st respondent's position was that the mere fact of the 1st appellant's acquittal did not mean that the two cases existed and that, having failed to demonstrate the existence of the two cases, there was no basis upon which the 1st appellant took possession of the suit property.

64. To our mind, the mere fact that a person is acquitted in a criminal charge based on facts which, if proved, may give rise to criminal culpability as well as civil liability, does not necessarily absolve him from civil liability. This must be so because the standard of proof in a criminal case is beyond reasonable doubt while, in civil cases, the standard is much lower being on a balance of probabilities. That position was restated in the case of Masembe v Sugar Corporation and Another [2002] 2 EA 434 where it was held that:

> "It is trite and rudimentary that proceedings in a criminal case cannot be used to prove a cause of action in a civil suit although the record can be used for certain purposes, for instance, to contradict a witness by facing him with what the witness had stated in the trial of the criminal case. But the proceedings and the result of the criminal trial cannot be made the basis for proof of a civil claim..."

65. It was submitted on behalf of the appellants that the learned Judge failed to evaluate the evidence relating to the process through which the 1st appellant acquired the suit property and erroneously found that the 1st appellant concealed his relationship with the other appellants. The 1st respondent's position regarding this submission was that the 1st appellant had originally concealed the fact of being a director of the 2nd appellant, initially claiming that he was merely a legal attorney of one Sylvia Hildergard Erna, who was said to be the one trading as the 3rd appellant who was said to have acquired the suit property for value without notice; that, in his testimony, the 1st appellant asserted that he is not only the 1st but also the 2nd and 3rd appellants, meaning that the suit property never changed hands; and that the supposed transfers to dummy businesses by the 1st appellant were nothing but a fraudulent attempt to put the suit property out of the reach of the true owners thereof.

66. It is clear from the record that the 1st appellant adopted different positions regarding is relationship with the other appellants and the entities involved in the transaction. In the pleadings, the 1st appellant set out to distance himself from the 2nd and 3rd appellants. It was, for example, pleaded that the 3rd appellant was an innocent purchaser for value without notice. At one point the 1st appellant even alleged that he

was merely a legal attorney of one Sylvia Hildergard Erna, who was said to be the one trading as the 3rd appellant. In his evidence, the 1st appellant admitted that there was no real difference between him and the other two appellants when he testified that he was "also the 2nd and 3rd defendants". Clearly, the 1st appellant was the same person as the 2nd and 3rd appellants only clothing himself with different attires on different occasions in order to try to conceal his true identity. Accordingly, the learned Judge was right in concluding that the suit property, contrary to the impression created by the appellants, did not in fact change hands.

67. Having considered the grounds of appeal as well as the submissions made before us in this appeal, we find no merit in this appeal, which we hereby dismiss with costs.

68. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024

A.K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C. Arb, FCIArb

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR